FILED
AUG 22 1962
JOHN F. DAVIS, CLERK

No. 360

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY
and
FLOYD N. LEMMONS,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

Appellees.

On Appeal from the United States District Court
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Eastern Division.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on June 4, 1962, in *Chicago & Eastern Illinois Railroad Company and Floyd N. Lemmons* v. *United States of America and Interstate Commerce Commission,* Civil No. 61 C 1706, dismissing plain-

tiffs' complaint brought to set aside an order of the Interstate Commerce Commission requiring appellants to cancel certain joint motor-rail rate schedules. Appellants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

The District Court did not render an opinion, but entered findings of fact and conclusions of law. These findings and conclusions, not yet reported, are set forth as Appendix A, page 1a, *infra*. The report of the Interstate Commerce Commission in *Bituminous Coal Via Motor-Rail—Lynnville, Indiana to Chicago, Illinois,* is reproduced as Appendix C, page 12a, *infra*.

JURISDICTION.

This action was brought under 49 U.S.C. § 17 (9) and 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission. The judgment of the three-judge District Court (Appendix B, page 11a, *infra*) was entered on June 4, 1962, and notice of appeal was filed in that court on June 29, 1962. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions, among others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Florida East Coast Ry.* v. *United States,* 234 U.S. 167; *United States* v. *Chicago, M., St. P. & Pac. R.R.,* 294 U.S. 499; *American Trucking Assns.* v. *United States,* 364 U.S. 1; *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567.

STATUTES INVOLVED.

1. The National Transportation Policy, 54 Stat. 889, 49 U.S.C. preceding §§ 1, 301, 901, and 1001: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

2. Section 15a(3) of the Interstate Commerce Act, 72 Stat. 572, 49 U.S.C. § 15a(3): "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable."

Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

3. Second Proviso to Section 206(a)(1) of the Interstate Commerce Act, 49 Stat. 551, 49 U.S.C. § 306(a)(1): "*And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part."

4. Section 216(c) of the Interstate Commerce Act, 49 Stat. 558, 49 U.S.C. § 316(c): "Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad and/or express and/or water. . ."

5. Section 216(e) of the Interstate Commerce Act, 49 Stat. 558, 49 U.S.C. § 316(e): ". . . Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or

water for transportation in interstate or foreign commerce . . . is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, ..."

6. Section 217(a) of the Interstate Commerce Act, 49 Stat. 560, 49 U.S.C. § 317(a): "Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. . ."

QUESTIONS PRESENTED.

1. Is an order of the Interstate Commerce Commission valid if it is founded only on the National Transportation Policy, without reference to, or basis in, any substantive provision of law?

2. Did the Commission exceed its statutory authority in ordering cancelled a joint motor-rail rate which Congress had authorized?

3. Is Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3)) relating to intermodal competition, applicable to competition between rail carriage and joint motor-rail carriage?

4. If the answer to question 3 is in the affirmative, must not the Commission make the findings required by Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3))?

5. If the answer to question 3 is in the negative, must not the Commission make a finding with respect thereto when the issue is raised in a proceeding involving competition between rail carriage and joint motor-rail carriage,

6. May the Commission, in the absence of cost evidence or unfavorable rate comparisons, require the cancellation of a proposed joint motor-rail rate in competition with all-rail rates, on the grounds that it constitutes a destructive competitive practice and is unjust and unreasonable?

7. May the Commission, and the District Court, disregard, and fail to make findings concerning, evidence of extensive and costly operating difficulties over all-rail routes which compete with a proposed motor-rail route?

8. Did the Commission, by administrative fiat, unlawfully restrict the applicability and scope of the Second Proviso to Section 206 (a)(1) of the Interstate Commerce Act (49 USC § 306(a)(1)) relating to motor transportation in interstate commerce over routes wholly within a single state?

9. Is the Commission empowered to require cancellation of joint motor-rail rates without determining and prescribing the lawful rate, or the maximum or minimum, or the maximum and minimum, rate or rates thereafter to be observed?

10. Did the Commission deny the Defendants (Plaintiffs-Appellants herein) a full and fair hearing in violation of the due process clause of the Fifth Amendment of the Constitution of the United States, the Administrative Procedure Act, and its own General Rules of Practice?

11. Is the Commission's order supported by adequate and requisite findings of fact having a rational basis?

12. Are the Commission's order and findings supported by substantial evidence of record?

13. Did the District Court err in failing and refusing to enjoin, annul, and set aside the order of the Commission in Investigation and Suspension Docket No. 7424, *Bituminous Coal Via Motor-Rail—Lynnville, Indiana to Chicago, Illinois?*

STATEMENT OF THE CASE.

The proceeding before the Commission involved the lawfulness of appellants' initial through single-factor motor-rail rate on bituminous coal from Lynnville, Indiana to Chicago, Illinois, via Haubstadt, Indiana. The coal mine at Lynnville is served by the New York Central Railroad Company (hereinafter referred to as "Central") and the Southern Railroad Company (hereinafter referred to as "Southern"). The Central has a line of railroad between Lynnville and Chicago, and appellant Chicago & Eastern Illinois Railroad Company (sometimes hereinafter referred to as "C&EI"), has a line of railroad between Evansville, Indiana and Chicago through Haubstadt, approximately 16 miles from Lynnville. The C&EI connects with the Southern at Evansville, Indiana, and has a joint rate with the Southern for the transportation of coal from Lynnville to Chicago. The published rate of $3.00

per ton over appellants' motor route to Haubstadt, thence via rail to Chicago, was identical to the rate of the Central and the joint rate of the Southern and the C&EI.

The rate as filed was protested by six railroads, including the Southern, and the Commission suspended the rate.

At the hearing on the lawfulness of the proposed rate the protestant railroads, although they had the burden of proof, since this was an initial rate (Report of Division 2, Appendix C hereto, page 14a), introduced no evidence other than general testimony to the effect that they were opposed to the joint motor-rail rate because it might lead to the spread of joint motor-rail rates to other coal mines. Appellants' evidence was to the effect, *inter alia*, that their proposed motor-rail route is the low-cost, more efficient mode of transportation. Division 2, by a vote of two to one, found that the proposed rate constituted a destructive competitive practice, and was unjust and unreasonable. The finding of Division 2 in support of such conclusion reads as follows:

> "If the railroads were forced by competition to enter into joint motor-rail rates, thus increasing their transportation costs, with reductions in their revenues for this important segment of traffic, the results could be unnecessary dissipation of carrier revenues and serious disturbance of a just and reasonable rate adjustment, in contravention of the national transportation policy."

The Commission made no reference to the issues raised by appellants, including those arising under Sections 15a(3) and 206(a)(1) of the Interstate Commerce Act.

In the District Court action, defendant United States filed a neutral answer, in which it stated that it neither supported nor opposed the Commission's order. The Com-

mission's order was defended by Commission counsel and counsel for the protesting railroads, which had intervened in the case.

The District Court adopted the findings and conclusions proposed by counsel for the Commission, and dismissed the complaint.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents novel questions concerning, *inter alia*, the power of the Commission to issue an order grounded only in the national transportation policy, without any reference to, or basis in, any provision of substantive law; the power of the Commission to thwart Congressional policy favoring the establishment of joint-motor-rail rates; the powers and duties of the Commission in a rate proceeding involving carriers of different modes of transportation; and the power of the Commission to restrict, in a rate proceeding, authority unqualifiedly granted by Congress to motor carriers engaged in interstate commerce over routes wholly within a single state.

I.

Question No. 1, *ante*, page 5, raises the issue whether the Commission can base an order solely on a provision of the national transportation policy. This policy, set out as footnotes following 49 U.S.C., Sections 1, 301, 901 and 1001, declares it to be the national transportation policy of the Congress "to provide for fair and impartial regulation of all modes of transportation . . . so administered . . . as to recognize and preserve the inherent advantages of each; to promote . . . economical and efficient service . . ., [and] to encourage the establishment and maintenance of reasonable charges for transportation services,

without . . . unfair or destructive competitive practices . . .” This declaration of policy is not a provision of substantive law, but is merely a rule of construction to be applied in resolving questions arising under the Interstate Commerce Act. *New York, New Haven & Hartford Railroad Company* v. *United States*, 199 F. Supp. 635 (D. Conn., 1961); *Cotton From Memphis and Helena to New Orleans*, 273 ICC 337, 367. The national transportation policy cannot be emphasized “to the detriment of the directive it merely qualifies” *Missouri Pacific Railroad Company* v. *United States*, 203 F. Supp. 629, 634 (E.D. Mo., E.D., 1962). Nevertheless, the Commission in the instant case applied the national transportation policy as a provision of substantive law. In its finding, quoted *ante*, at page 8, Division 2 stated that if the railroads were forced by competition to enter into joint motor-rail rates, the results could be in contravention of the national transportation policy; that therefore the proposed schedules constitute a destructive competitive practice and are unjust and unreasonable. At no point in its report does the Commission refer to any substantive provision of law, nor could it properly do so, since there are no subordinate findings, and no evidence, relating to any such substantive provision. The subordinate findings relate only to alleged “destructive competitive practices”, as used in the national transportation policy.

Moreover, the Commission unlawfully confined its consideration of the national transportation policy to the provision dealing with “destructive competitive practices”, and failed to consider the provisions dealing with the promotion of economical and efficient service, or the preservation of the inherent advantages of each mode of transportation. Cf. *New York, New Haven & Hartford Railroad Co.* v. *United States, supra*; *Missouri Pacific Railroad Co.*

v. *United States, supra*; *St. Louis-San Francisco Railway Co.* v. *United States*, ... F. Supp. ..... (Civil No. 61 C 309 (1), E.D. Mo. ED., 1962, Civil No. 61 C 309(1), not yet printed). Unrebutted evidence of record shows that the motor-rail route of appellants is the low cost, more efficient route.

II.

Question No. 2, *ante*, page 5, is directed at the action of the Commission in ordering a joint motor-rail rate cancelled in the face of a Congressional policy that establishment of such rates be encouraged. The Commission ordered the rate cancelled because "competition" from such rate "might" force the railroads to enter into joint motor-rail rates, with results that "could be in contravention of the national transportation policy". Division 2 thereby nullified a Congressional policy so clearly and succinctly expressed in the brief of the United States in *United States* v. *Association of American Railroads*, 36 F. Supp. 225, (Dist. of Col., 1940), an anti-trust suit against the railroads based on concerted refusal to enter into joint rates with motor carriers. (A consent decree was entered in the United States District Court for the District of Columbia in Civil Action No. 4551, CCH Trade Regulation Reports, 9th Edition, paragraphs 52, 631). The brief of the United States stated:

> **"In the declaration of policy contained in Section 202(a) of the Motor Carrier Act, Congress declared that co-ordination between motor carriers and other carriers was one of the fundamental policies of the Act, and it provided in Section 216(c) of the Act that common carriers of property and passengers by motor vehicle 'may establish reasonable through routes and joint rates with common carriers by railroad.'"**

The Commission's action raises the further substantial question whether the Commission may, by administrative fiat, restrict the applicability and scope of the second proviso to Section 206(a)(1) of the Interstate Commerce Act, (49 U.S.C. Section 306(a)(1)) (See Question 8, *ante*, page 6). Under said proviso, a motor carrier holding intrastate authority, upon filing evidence of such authority with the Interstate Commerce Commission, may engage in interstate commerce over routes wholly within a single state in the transportation of commodities authorized by the state regulatory body. Appellant Lemmons has filed with the Interstate Commerce Commission evidence of such intrastate authority with respect to the transportation of coal.

The proposed joint motor-rail rate was published pursuant to Section 216(c) of the Interstate Commerce Act, *ante*, page 4. Sections 6(1) and 217(a) of the Interstate Commerce Act (49 U.S.C., Sections 6(1) and 317(a)) deal with the publication of railroad rates and motor carrier rates, respectively. Section 6(1) permits the railroads to publish separately established rates over through routes with other railroads (Cf. *Thompson* v. *United States*, 343 U.S. 549) but Section 217(a) requires, without qualification, publication of *joint rates* in connection with through routes established by motor carriers with other motor carriers or with any railroad. Co-ordinated motor-rail service "[can] only be accomplished through the medium of through routes and joint rates. . ." *Kansas City S. Transport, Inc. Common Carrier Application*, 10 M.C.C. 221, 235-236; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 71 (fn. 7). See also ICC Circular No. 20, Supp. 4, Rule 31, prohibiting the railroads from filing proportional rates in connection with through routes with motor carriers, and requiring "in accordance with the

provisions of Section 216(c)" the filing of *joint* rates on any through routes established with motor carriers. Since appellant Lemmons cannot publish proportional rates in connection with through routes with railroads, and since the Commission's order in effect prohibits him from entering into joint rates with railroads on coal traffic, he is precluded, contrary to the authorization contained in the second proviso to Section 206(a)(1), from engaging in interstate commerce on coal over routes wholly within the State of Indiana.

III.

Questions 3, 4, 5, and 6, *ante*, pages 5, 6, present the issue whether the Commission, in a proceeding involving competition between a motor-rail route and all-rail routes, may ignore, and fail to make reference to or findings under, Section 15a(3) of the Interstate Commerce Act (49 U.S.C. Section 15a(3)). Said section requires the Commission, in determining whether a rate is lower than a reasonable minimum rate in a proceeding involving competition between carriers of different modes of transportation, to consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable; and prohibits the Commission from holding up the rates of a carrier to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy. Joint motor-rail transportation is a separate and distinct mode of transportation. *New York, New Haven & Hartford Railroad Co.* v. *United States*, 199 F. Supp. 635 (D. Conn., 1961), is authority for the proposition that box-car, rail-highway-rail (trailer-on-flat-car), motor-water, rail-water, and rail-water-rail are all separate and distinct modes of transportation. In or-

dering cancelled the proposed joint motor-rail rate, the Commission in effect is holding up the proposed rate to a level designed to protect the traffic of protestant Central, and to a level sufficiently high that railroads generally would refrain from entering into joint motor-rail rates to meet competition from the proposed rate. Yet the Commission made none of the findings required by Section 15a(3). It ignored in its findings the facts and circumstances attending the movement of the traffic over the motor-rail route, although persuasive and unrebutted evidence that such route is the low cost, more efficient route was of record.

Further, the Commission, in giving consideration to the objectives of the national transportation policy, failed to consider all pertinent provisions thereof. *New York, New Haven & Hartford Railroad Co.* v. *United States,* 199 F. Supp. 635 (D. Conn., 1961); *Missouri Pacific Railroad Co.* v. *United States,* 203 F. Supp. 629 (E.D., Missouri, E.D., 1962); *St. Louis-San Francisco Railway Co.* v. *United States,* ..... F. Supp. ..... (E.D., Missouri, E.D., 1962, Civil No. 61 C 309 (1), not yet reported). The Commission here completely ignored the requirement of the national transportation policy that the Interstate Commerce Act be so administered as to "recognize and preserve the inherent advantages of each mode" of transportation. *Interstate Commerce Commission* v. *Mechling,* 330 ICC 567; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56, 60-61. The Commission's habitual failure to observe such admonition motivated the enactment of Section 15a(3). H. Rpt. No. 1922, 85th Cong., 2nd Sess. (1958); *New York, New Haven & Hartford Railroad Company* v. *United States, supra,* at page 642. Under Section 15a(3) the Commission must give effect to the "inherent advantage" rule and must approve a rate proposed by the low cost

mode, unless such rate is so low as to harm the proponent thereof. *New York, New Haven & Hartford Railroad Co.* v. *United States, supra; Missouri Pacific Railroad Co.* v. *United States, supra; Pennsylvania Railroad Co.* v. *United States,* 202 F. Supp. 584 (E.D. Pennsylvania, 1962) *St. Louis-San Francisco Railway Co.* v. *United States, supra.* Appellants introduced uncontroverted evidence that the motor-rail route is the low cost, more efficient mode, while protesting railroads, who had the burden of proof on this point (*New York, New Haven & Hartford Railroad Co.* v. *United States, supra,* at page 646; *Missouri Pacific Railroad Co.* v. *United States, supra,* at page 635), introduced no evidence, and the Commission made no findings, with respect thereto.

IV.

Questions 6 and 7, *ante,* page 6, raise the further issue whether the Commission may, under any circumstances, condemn a rate as unreasonably low, without first finding that it is non-compensatory. The Commission, of course, made no such finding, nor could it have done so; the proposed rate is identical to the all-rail rate, the protestant railroads failed to introduce any cost or rate evidence, and appellants presented evidence that the joint motor-rail route is the low-cost, more efficient route. See *St. Louis-San Francisco Railway Company* v. *United States, supra:* "Since the rates involved were found to be compensatory, there is no evidence to support a conclusion of unfair or destructive competitive practices as such."

V.

Another substantial question is whether the Commission may predicate its order cancelling a published rate solely on its speculative conclusions that joint motor-rail rates *might* spread to other mines (Question 11). Cf.

United States v. *Chicago, Milwaukee, St. Paul & Pacific Railroad*, 294 U.S. 499, 507-510. Under the Administrative Procedure Act (5 U. S. C. Section 1001 *et seq.*) administrative agencies may not act on "surmise or speculation or untenable inference" (Sen. Doc. 248, 79th Congress, page 365).

There is the further substantial question whether the Commission is empowered to require cancellation of an initial joint motor-rail rate without determining and prescribing the lawful rate or the lawful minimum rate. The source of the Commission's power over joint motor-rail rates is found in Section 216(e) of the Interstate Commerce Act. Unlike Sections 15 and 307(b), which provide that the Commission, upon finding a rail rate or water carrier rate unlawful, *may* prescribe the lawful rate or lawful minimum rate, Section 216(e) provides that the Commission, upon finding motor carrier rates or joint motor-rail or motor-water carrier rates unlawful, *shall* prescribe the lawful rate or lawful minimum rate. In the only ruling it has ever made on this point, the Commission held that it is required by Section 216(e) to determine and prescribe the minimum reasonable rates to be observed. *Oil Field Haulers Association* v. *Acton*, 53 M.C.C. 507, 508. The Commission in effect has prohibited appellants from entering into a joint motor-rail rate on the involved traffic.

VI.

Division 2 found that it has long been the practice of mines to bear the burden of transporting their coal to the railroads. (Appendix C, Page 16a) The railroads have been enjoined, under the Sherman Act, from concertedly refusing to enter into cooperative arrangements with motor carriers. *United States* v. *Association of American*

Railroads, D. Dist. of Col., 1941, C. C. H. Trade Reg. Rpts., paragraphs 52 and 631. Evidence of record indicates the continued existence of such concerted refusal. A serious question arises as to the propriety of supporting ultimate findings with a subordinate finding as to a practice that violates Federal law.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are so substantial and are of such public importance as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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PROOF OF SERVICE.

I, Frank F. Vesper, one of the attorneys for appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of August, 1962 I served the foregoing jurisdictional statement on each adverse party in the following manner:

1. On appellee United States by mailing copies thereof, in a duly addressed envelope with air mail postage prepaid, to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D.C.; and in a duly addressed envelope, with first-class postage prepaid, to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450, United States Court House, Chicago, Illinois.

2. On appellee Interstate Commerce Commission by mailing copies thereof in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, its General Counsel, and Fritz Kahn, its Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On appellees The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and the New York, Chicago and St. Louis Railroad Company, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their attorneys of record, Richard J. Murphy, Esq., and

Jack Rand, Esq., New York Central System, 1225 LaSalle Street Station, Chicago 5, Illinois.

.....

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APPENDIX A—Findings and Conclusions.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and FLOYD N. LEMMONS, *Plaintiffs,* v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 61-C-1706

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action to enjoin, annul and set aside orders of the defendant, Interstate Commerce Commission, having come on for hearing on May 2, 1962, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. §2284, upon the plaintiffs' complaint and the defendants' answers thereto, and the Court having received in evidence a certified copy of the record of the proceedings before the Commission; now, after reviewing said record in its entirety and hearing oral arguments of counsel for the respective parties and after consideration of said arguments and the written briefs of counsel, the Court makes and enters the following findings of fact and conclusions of law:

Findings of Fact

1. By schedules filed with the defendant, Interstate Commerce Commission, and published to become effective on September 1, 1960, the plaintiffs, Chicago & Eastern Illinois Railroad Company, a common carrier railroad, hereinafter referred to as C&EI, subject to regulation under Part I of the Interstate Commerce Act, 49 U.S.C.

§1 *et seq.*, and Floyd N. Lemmons, a common carrier by motor vehicle, hereinafter referred to as Lemmons, subject to regulation under Part II of the Interstate Commerce Act, 49 U.S.C. §301 *et seq.*, proposed to establish a joint motor-rail rate of $3 per ton, minimum 1,000 tons, on bituminous coal from Lynnville, Indiana, to Chicago, Illinois, and points within the Chicago switching limits.

2. The intervening defendants, The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and The New York, Chicago and St. Louis Railroad Company, duly protested the filing of the proposed rate with the Commission.

3. Operation of the proposed rate was ordered suspended to and including March 31, 1961, by order of the Commission entered August 29, 1960, by which the Commission instituted an investigation into the lawfulness of the proposed rate, docketed as Investigation and Suspension Docket No. 7424, Bituminous Coal Via Motor-Rail From Lynnville, Ind., to Chicago, Ill.

4. The investigation proceeding not having been concluded at the expiration of the period of suspension, the plaintiffs voluntarily postponed the effective date to and including May 15, 1961, when the rate, as increased to $3.07, went into effect.

5. Hearing was had before an examiner of the Commission at Chicago on December 14, 1960, at which testimony and exhibits were received in evidence.

6. The parties filed briefs on January 30, 1961.

7. On April 28, 1961, the Commission, Division 2, entered its report and order in which it found the proposed rate to be unjust and unreasonable and to constitute a destructive competitive practice. 313 I.C.C. 573.

8. In addition to its ultimate finding above, the Commission found that:

A. Lynnville, the origin from which the rate at issue was published, is located in the Princeton Group of the midwest mine field located in the States of Illinois, Indiana, and Kentucky.

B. The rates applicable from the said mine field to Chicago are on a group and differential basis as prescribed in Fine Coal From Midwestern Mines to Chicago, 298 I.C.C. 37 (1956), as modified in Coal From Illinois, Indiana, and Kentucky to Illinois and Indiana, 308 I.C.C. 673 (1959). The rates from different origins within a single group are identical and the rates applying from origins in any group are differentially related in a fixed amount of cents per net ton to the rates applicable from origins in any other origin group.

C. The rates embodied in the midwestern rate structure apply on coal loaded in cars, the shipper bearing the cost of transportation from its mine to the railroad, which practice tends to encourage a mine to transport its coal to the nearest railroad.

D. In addition to performing the rail line-haul movement to Chicago, plaintiffs would undertake the truck transportation of the coal from the mine at Lynnville to the C&EI railhead at Haubstadt, Indiana, and its transfer from truck to rail car through the facility there built for this purpose. The undertaking of additional services not presently performed at the same group rates would increase the cost of rendering the service and reduce the rail revenues.

E. Chicago is an important market for midwestern coal, having received during 1959 approximately six million tons. Likewise, coal is an extremely important commodity to protestants. During the year 1959 the six protestants handled almost 200,000,000 tons of coal. Coal traffic constitutes approximately 38.9 percent of the New York Central's tonnage, and approximately 18.7 percent of its revenue. Specifically, the coal originating at Lynnville is important to the Central as illustrated by the fact that during the first ten months of 1960 the Central originated 1,315,000 tons of coal at that location.

F. Should the assailed rates be permitted to become effective, the New York Central would reduce its rate to prevent loss of traffic.

G. Similar joint motor-rail arrangements could be expected to be published by other railroads in conjunction with Lemmons or some other motor carrier. Such practices would cause railroads to absorb most or all of the cost of transporting the coal from the mine to the railroad. Additionally, to avoid unlawful discrimination, like arrangements would probably be required from numerous off-rail mines.

H. The cross-hauling of coal by motor carriers to facilities of competing railroads would entail services at the same group rates which services are not presently performed. The divisions to the motor carriers of such joint rates would reduce the rail revenues and increase the cost of rendering the service.

I. Coal is a relatively low-priced heavy-loading commodity. The rail rates thereon are generally maintained at a low level in relation to the cost of performing the service.

J. If railroads were forced by competition to enter into joint motor-rail rates with increased transportation costs and reduced revenues on their important coal traffic, the results could be the unnecessary dissipation of their revenues and a serious disturbance to the just and reasonable rate structure in contravention of the National Transportation Policy.

9. The Commission concluded that the plaintiff's schedules naming the proposed rate constitute a destructive competitive practice and are unjust and unreasonable, and ordered the schedules cancelled.

10. The plaintiffs, on June 5, 1961, petitioned the Commission for reconsideration of its report and order, and on August 31, 1961, their petition was denied.

11. The instant suit was brought on October 10, 1961, on which date, this Court, the Honorable Michael L. Igoe,

entered a temporary restraining order, which, by stipulation of the parties, has been continued in effect pendente lite.

12. While many grounds for the Court's holding invalid the order of the Commission have been urged by plaintiffs, which grounds were replied to by defendant and intervenors (hereinafter collectively referred to as defendants), the basic disagreement among the parties arises from the approach taken by the Commission in deciding the case. Plaintiffs assert that the Commission should have considered the assailed rate independently of the midwestern rate structure, while the defendants state that the Commission correctly considered that rate in terms of the rate structure of which it would become a part. In argument before this Court plaintiffs asserted that the Central could lawfully reduce its rate to a level covering the out-of-pocket cost of performing the service, and that reductions of other rail rates should be denied by the Commission only if such reduced rates fail to cover out-of-pocket costs. Defendants state in reply that the Commission had the power to protect the prescribed just and reasonable midwestern coal rate structure from the attack of a singly rail carrier by preventing the initial act which would lead to its impairment and to the consequent substantial reduction in rail revenues.

13. Plaintiffs claim support for their contention in section 15a(3) of the Interstate Commerce Act, 49 U.S.C. §15a(3), which provides:

> In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national

> transportation policy declared in this Act. [Emphasis added.]

Defendants reply by pointing out that, while a motor carrier is a party to the assailed rate, the service performed thereunder is essentially rail and is no different than the service performed at numerous off-rail mines in the midwestern mine field. Since Section 15a(3) of the Act by its terms applies only to inter-modal competition, they say, the Commission retains power to protect a rail rate structure from the assult of a single railroad even though a motor carrier may be the instrumentality employed by such a railroad to compete. Further, defendants state that since Section 15a(3) of the Act makes reference to the National Transportation Policy, that policy should be considered in its construction. The National Transportation Policy declares it to be the policy of Congress inter alia

> to encourage the establishment and maintenance of reasonable charges for transportation services, without . . . destructive competitive practices . . .

Thus, defendants argue that, even if Section 15a(3) were applicable, it must be construed, as specifically required by its terms, in accordance with the National Transportation Policy forbidding destructive competitive practices and that the destruction of an adjudged reasonable coal rate structure for the temporary gain of a single railroad, party to that structure, constitutes such a practice.

14. Plaintiffs also contend that the Commission was powerless to order the assailed rate cancelled without simultaneously prescribing a just and reasonable rate for the future. This argument is based on Section 216(e) of the Interstate Commerce Act, 49 U.S.C. §316(e), which provides that in proceedings arising by complaint or by investigation upon the initiative of the Commission, when the Commission finds a rate to be unlawful "it shall determine and prescribe the lawful rate . . ." Defendants point out, however, that this proceeding arose under 216(g) of the Act, 49 U.S.C. §316(g), which deals with

the investigation and suspension of new rates. That section, in effect, provides that, in a proceeding arising thereunder, the Commission may enter an order as would be proper in a proceeding arising under Section 216(e). Defendants point out that the language in Section 216(g) is permissive and that it is customary for the Commission in a proceeding arising under that section to order rates cancelled without prescribing rates for the future. They cite Malone Freight Lines v. United States, 159 F. Supp. 952 (N.D. Ala. 1957), a case decided by a statutory three-judge court and upholding the Commission's right to order cancellation of as unlawful rate under 216(g).

Conclusions of Law

1. The Court has jurisdiction of the parties and the subject matter in this case, 28 U.S.C. §§1336, 1398, 2284, and 2321-2325; Midwest Emery Freight System, Inc. v. United States, 202 F. Supp. 229 (N.D. Ill. 1961).

2. The task of this Court in reviewing the assailed actions of the Commission is limited and well-defined. If the orders complained of lie within the scope of the statute which the Commission is empowered to administer and enforce and are based upon substantial evidence, this Court may not set them aside or modify them, even though it may have decided otherwise originally and even though the orders may be against the weight of the evidence. 5 U.S.C. §1009(e); Illinois Cent. R. Co. v. United States, 101 F. Supp. 317, 327 (N.D. Ill. 1951).

3. A joint motor-rail rate, such as was published by the plaintiffs, is required by section 216(c) of the Interstate Commerce Act to be just and reasonable. 49 U.S.C. §316(c).

4. Whether a given rate is, indeed, just and reasonable is a question of fact, and it is the function of the Commission to consider the evidence offered in support of a rate and to accord it appropriate weight. Board of Trade v. United States, 314 U.S. 534, 546 (1942); Illinois Central & C. R. R. v. Interstate Commerce Commission, 306 U.S. 441, 454 (1907).

5. In administering the provisions of section 216(c), as in administering the other sections of the Interstate Commerce Act, the Commission is obliged to consider the provisions of the National Transportation Policy, one of the tenets of which is to encourage the establishment and maintenance of reasonable charges for transportation services without destructive competitive practices. 49 U.S.C. preceding §1; McLean Trucking Co. v. United States, 321 U.S. 67, 82-83 (1944).

6. The Commission's finding that the proposed rate is unjust and unreasonable and constitutes a destructive competitive practice, as the subsidiary findings upon which the Commission's conclusion was based, was reasonable and supported by substantial evidence. See Chicago, R. I. & P. R. Co. v. United States, ... F. Supp. ..... (N.D. Ill. 1962).

7. Where, as herein, the Commission determines upon substantial evidence in the whole of the record, that a proposed rate is unjust and unreasonable and constitutes a destructive competitive practice, the Commission is empowered to require the cancellation of the offending schedules. 49 U.S.C. §§304(c), 316(e), 316(g) and 317(a); Malone Freight Lines v. United States, 159 F. Supp. 952 (N.D. Ala. 1957).

8. The requirement of section 15a(3) of the Interstate Commerce Act that the Commission not hold up the rate of one mode of transportation to protect the traffic of another mode is inapplicable where, as herein, one railroad, albeit under a proposed joint rate with a motor carrier, is seeking to provide additional services than are provided by other railroads, though at the same rate. 49 U.S.C. §15a(3); cf. New York, N. H. & H. R. Co. v. United States, 199 F. Supp. 635 (D. Conn. 1961); Missouri Pacific R. Co. v. United States, ... F. Supp. ..... (E.D. Mo. 1962). The Commission was justified in considering the substance of the service proposed to be performed rather than the form of the rate alone; that is, the publication of the joint rate did not prevent the Commission from considering the intramodal competitive situation in-

volved. See Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245, 271 (1936).

9. The Commission's conclusions, supported by substantial findings of fact based upon substantial evidence in the whole of the record, sufficiently disclose the basis of its judgment. Alabama G. S. R. Co. v. United States, 340 U.S. 216, 227-28 (1951); United States v. Pierce Auto Lines, Inc., 327 U.S. 515, 531-32 (1946).

10. This Court would depart from its competence and its limited function if it were to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case; this is a task peculiarly for the Commission. Ayrshire Corp. v. United States, 335 U.S. 573, 592-93 (1949);[1] Chicago & E. I. R. Co. v. United States, 107 F. Supp. 118, 125-26 (S.D. Ind. 1952), aff'd mem., 344 U.S. 917 (1953).

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[1] "There is no doubt therefore, that the Commission believed that the competitive factor was an important one in considering this problem of rate relationships. The result may, as appellants contend, favor some Illinois mines over Indiana as respects certain markets. That would seem to follow, for example, from the elimination of the low single-line rate that the Commission found to be disruptive of rate relations between these groups. But it does not indicate that the rates approved by the Commission were unlawful. That might be established by showing, for example, that the Commission gave weight only to the competitive factor. Yet all that appellants attempt here is to show that discrepancies in rates are not warranted by any difference in transportation conditions or in distance. That is not enough provided the Commission was justified in considering the element of competition.

"We think it was. Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field if we undertook to accommodate

11. The report and orders of the defendant, Interstate Commerce Commission, entered April 28, and August 31, 1961, in Investigation and Suspension Docket No. 7424, Bituminous Coal, Motor-Rail, Lynnville, Ind., to Chicago, have a rational basis and are valid and proper in all respects and, therefore, the relief sought by the plaintiffs should be denied and their complaint dismissed.

Wherefore, it is ordered that an appropriate final judgment and decree in accordance with the foregoing findings of fact and conclusions of law be entered.

Dated at Chicago, Illinois, this 4th day of June, 1962.

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[1] (Continued)
the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See Board of Trade v. United States, 314 U.S. 534, 548; New York v. United States, 331 U.S. 284, 247-249." [Emphasis added.]

APPENDIX B—Judgment.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY and FLOYD N. LEMMONS,
Plaintiffs,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil Action
No. 61-C-1706

FINAL JUDGMENT AND DECREE

The above-entitled action having come on for hearing on May 2, 1962, before this Court, constituted as a three-judge district court under section 2284 of the Judicial Code, 28 U.S.C. §2284, and this Court having this day filed its Findings of Fact and Conclusions of Law, sustaining the assailed orders of the defendant, Interstate Commerce Commission, it is hereby,

Ordered, Adjudged And Decreed that the temporary restraining order entered October 10, 1961, be vacated, that the relief prayed for in the complaint be denied and that the complaint be dismissed.

Dated at Chicago, Illinois, this 4th day of June, 1962.

.....
Win G. Knoch
United States Circuit Judge

.....
Joseph Samuel Perry
United States District Judge

.....
Michael L. Igoe
United States District Judge

APPENDIX C—Report of the Commission.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET

No. 7424

BITUMINOUS COAL VIA MOTOR-RAIL - LYNNVILLE, IND. TO CHICAGO, ILL.

Decided - April 28, 1961

Proposed initial, motor-rail rate on bituminous coal from Lynnville, Ind., to Chicago, Ill., found unjust and unreasonable. Schedules required to be canceled, and proceeding discontinued.

Patrick C. Mullen, Harvard R. Osmond, and Frank F. Vesper for respondents.

Robert M. Bierma, Ralph M. Buzek, Richard J. Murphy, Joseph J. Nagle, and Jack Rand for protestants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND HERRING BY DIVISION 2:

Due and timely execution of our function under sections 15 (7) and 216 (g) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on September 1, 1960, the respondents[1] proposed to establish an initial single-factor motor-rail rate[2] of $3 minimum 1,000 tons, on bituminous coal from Lynnville, Ind., to Chicago, Ill., and points within the Chicago switching limits. Upon protest of The New York Central Railroad Company, Illinois Central Railroad Company, Chicago, Milwaukee,

[1] Chicago & Eastern Illinois Railroad Company and Floyd N. Lemmons (MC-120586).

[2] Rates are stated per net ton.

St. Paul and Pacific Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, and The New York, Chicago and St. Louis Railroad Company, the operation of the proposed schedules was suspended to and including March 31, 1961, and the effective date has been voluntarily postponed to and including May 15, 1961. Upon its effectiveness, the rate would be increased to $3.07 by the addition of the Ex Parte No. 223 increase.

At the hearing, and again on brief, the respondent objected to the appearance, and the testimony of the witnesses, in behalf of the protestants other than the New York Central. They argue that the protests are not a part of the record, that these protestants are not proper parties to this proceeding, and that they have not shown sufficient interest to intervene. The appearances of the protestants thus mentioned were duly entered of record, and they were entitled to submit evidence pertinent to the issues in the proceeding.

The rates on bituminous coal from Indiana, Illinois, and western Kentucky to the Chicago area are on an origin group and differential basis. The rate structure described in Fine Coal from Midwestern Mines to Chicago, 298 I.C.C. 37, as modified in Coal from Illinois, Indiana, and Kentucky to Illinois and Indiana, 308 I.C.C. 673, is the basis for the present rates. As subsequently increased through Ex Parte No. 223, the rates maintained by the railroads from the Princeton group to Chicago are $3.57 in single carloads and $3.07, minimum 1,000 tons. Lynnville is in the Princeton group; it is served by the New York Central, which has a fairly direct route to Chicago. However, to protect its long haul, that road will not participate in joint rates or routes with other carriers in the movement of coal from Lynnville to Chicago.

The proposed rate, which is the same as the all-rail rate, minimum 1,000 tons, would apply from Lynnville

over the motor route of Floyd N. Lemmons to Haubstadt, Ind., thence the Chicago & Eastern Illinois to destination. The respective motor and rail distances over this route are not revealed. The motor carrier has a 95-cent intrastate rate on coal from Lynnville to Evansville, Ind., about 30 miles, but has neither interstate or intrastate rates from Lynnville to Haubstadt. The respondents herein have not previously transported coal over any route from Lynnville to Chicago, and so far as appears the Chicago & Eastern Illinois is not a party to any rate on coal over any route from Lynnville to the Chicago district. Thus, the proposed rate is an initial rate, and the burden of showing its unlawfulness rests upon the protestants.

Under the tariff provisions, the proposed rate would apply on bituminous coal tendered at one time, on one bill of lading, by one consignor for delivery to one consignee at one destination, subject to a minimum of 1,000 tons per shipment. The protestants claim that this does not require the shipment of 1,000 tons at one time, but that the shipment may be tendered but not actually shipped on one day. The mine, which operates in two shifts about 15 hours a day, has two 700-ton tipples where it is said a 1,000-ton tender can be made. About 22 tons can be loaded on a truck. The actual loading of the truck is performed in about 2 minutes by the driver's operation of a loading device, after which the scale weight is determined. The motor carrier expects to use 5 vehicles in double shifts, or 8 to 10 vehicles in single shifts, each vehicle making 5 round trips a shift between the mine and Haubstadt. At the latter point the coal would be handled through facilities which were being built at the time of the hearing by the Chicago & Eastern Illinois for about $130,000, and rented to the motor carrier for 2 cents a ton.

When coal is loaded into rail cars, it is possible on some mine siding to load sufficient cars to accumulate 1,000 tons of coal at one time. It seems to us reasonable to construe the words "at one time" as meaning a period of not more than one calendar day. According to the

record, it would be practicable for the respondent motor carrier to transport the proposed minimum of 1,000 tons in that period.

Reconsignment privileges at Chicago permit free reconsignment of cars at destination, which it is urged authorizes delivery of cars at more than one spur or delivery points within the Chicago area. The term "destination" used in the tariff is broad enough to permit delivery at more than one location within a terminal area. Several large users of coal in Chicago do have more than one delivery location. However, delivery at more than one location in the same switching district would destroy the character of a volume rate. Iron or Steel Plate or Sheet, Illinois to La Crosse, 311 I.C.C. 81, 95.

Chicago is an important market for coal. During 1959, it received about 6 million tons from origins in Indiana, Illinois, and western Kentucky. Coal is an important segment of the protestants' traffic; for example, in that year six of them handled 198,974,794 tons, which was 27.4 percent of their carload tonnage, and produced about 5.6 percent of their revenue from all carload traffic. The coal traffic constitutes 38.9 precent of the New York Central's total traffic and accounts for 18.7 percent of its revenue.

Coal from Indiana, Illinois, and western Kentucky mines in the midwestern field moves to points of consumption by rail, rail-barge, motor-barge, and to some extent by motor. The volume by motor carriers is mostly for short distances and is increasing. Where production has been sufficiently large to justify the expenditure, the railroads have constructed spurs to off-rail mines. There are many mines which do not have rail service and must use either privately-owned motor vehicles or local motor carriers to move the coal to the railhead. However, the coal here sought to be attracted by the respondents is not of that type. It is produced at mines served by the New York Central and now moves over that road. The New York Central originated 1,315,000 tons of coal at Lynn-

ville in the first 10 months of 1960. By the instant proposal the respondents hope to divert about 200,000 tons of that traffic annually. If the proposed rate were approved, the evidence indicates that the New York Central would reduce its rate to prevent loss of the traffic; also, similar joint motor-rail arrangements could be expected to be made from other midwestern mines to the same and other destinations.

It has long been the practice of mines to bear the burden of transporting their coal to the railroads, and this encourages the delivery of the coal to the nearest railhead and maximizes net rail revenue. This practice has heretofore been respected by rail carriers generally. Reference is made to numerous mines in the midwestern field served by particular railroads which are only short highway distances from competing roads. Approval of the proposed rate, the protestants fear, would force midwestern railroads generally to reach out by similar arrangements to mines served by competing railroads and absorb most or all of the cost of transporting the coal to the railhead. Moreover, to avoid unlawful discrimination, like arrangements would probably be required also from numerous off-rail mines. Ultimately, they fear, this might result in breaking down the present just and reasonable midwestern coal-rate adjustment.

The cross-hauling of coal by motor carriers to facilities of competing rail lines would entail additional services at the same group rates which are not presently performed. The divisions to the motor carriers of such joint rates would reduce the rail revenues and increase the cost of rendering the service. Coal is a relatively low-priced, heavy-loading commodity, and rail rates thereon are generally maintained at a low level in relation to the cost of performing the service. If the railroads were forced by competition to enter into joint motor-rail rates, thus increasing their transportation costs, with reductions in their revenues for this important segment of traffic, the results could be unnecessary dissipation of carrier revenues and serious disturbance of a just and reasonable

rate adjustment, in contravention of the national transportation policy.

For the foregoing reasons, we find that the proposed schedules constitute a destructive competitive practice, and are unjust and unreasonable. An order will be entered requiring their cancellation and discontinuing the proceeding.

Commissioner Freas, dissenting in part:

I agree with the conclusions that this is an initial rate and that delivery at more than one location in the same switching district would destroy the character of the volume rate. However, in the absence of convincing cost evidence or rate comparisons I find no support for holding that the proposed rates are shown to constitute a destructive practice or to be unjust and unreasonable.

APPENDIX D—Order of the Commission.

ORDER

At a Session of the Interstate Commerce Commision, Division 2, acting as an Appellate Division, held at its office in Washington, D. C. on the 31st day of August, A. D. 1961.

INVESTIGATION AND SUSPENSION DOCKET

No. 7424

BITUMINOUS COAL VIA MOTOR-RAIL-LYNNVILLE, IND. TO CHICAGO, ILL.

Upon consideration of the record in the above-entitled proceeding and petition of respondents, Chicago & Eastern Illinois Railroad Company and Floyd N. Lemmons, for reconsideration of the report and order of Division 2, decided April 28, 1961, and for oral argument, filed June 5, 1961; and reply thereto by protestants, filed July 10, 1961;

It is ordered, That the petition for reconsideration and oral argument be, and it is hereby, denied, for the reason

that the matters submitted in support thereof do not constitute substantial and material grounds to warrant granting the action sought;

And it is further ordered, That the order entered in this proceeding on April 28, 1961, which order, pursuant to section 17 (8) of the Interstate Commerce Act was stayed pending disposition of the petition, be, and it is hereby, reinstated and modified so as to become effective on October 16, 1961, without change in the requirements of said order.

By the Commission, Division 2, acting as an appellate division.

Harold D. McCoy
Secretary

(Seal)